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Trade and Environment's New Agenda

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The trade and environment debate has changed. Or, more accurately, trade and environment conflicts have changed, and the debate on them *should* change to reflect the new realities. Many of the issues that were paramount in the early 1990s, when trade and environment was a new policy concern, have lost their urgency and have been replaced by new, more pressing issues.

The viability of the WTO increasingly depends on the support of a global community concerned with environmental issues. It will therefore be critical for Trade Ministers to address trade and environment—particularly the new issues—at their upcoming fourth Ministerial Conference. But efforts to make trade and environment objectives mutually compatible will fail unless stakeholders recognize and understand the nature of the new landscape.[1]

History and Evolution

While there had been several earlier environment-related trade disputes, it was the 1991 Tuna-Dolphin case (the panel report of which was never adopted) that raised the profile of the trade/environment interface. The dispute involved five major issues:

- **Process and production methods (PPMs):** The U.S. restricted the import of Mexican tuna caught using methods harmful to dolphins. The panel ruled that a tuna was a tuna, however it was caught, and that the U.S. had no right to differentiate on that basis.
- **North-South clashes in values:** Mexico accused the U.S. of "exporting" environmental values that were inappropriate for the Mexican social, economic and environmental context.
- **Extraterritorial measures:** The U.S. acted to protect dolphins that were outside its territory.
- **Eco-dumping:** U.S. environmentalists and fishermen accused Mexico of lax regulation of its tuna fisheries, which they claimed gave Mexican tuna fishermen an unfair advantage over domestic industry in the U.S.
- **Unilateralism versus multilateralism:** The panel argued that international environmental agreements were less trade-restrictive than unilateral trade measures as a way to deal with international environmental disputes over process. As such, the trade measures in this case failed a critical test for GATT-legality.

While none of these issues is dead, an assessment of the evolution of WTO law since the early 1990s reveals that few carry the urgency for reform that they once did.

- **PPMs:** The argument has been convincingly made that there is no practical difference between PPM-based and product-based trade measures.[2] Recent legal literature asserts that there is no basis in WTO law for rejecting PPM-based environmental regulations on traded goods at the border.[3] And new Appellate Body rulings seem to have removed the barriers to using PPM-based trade measures, as long as it is done in a manner that conforms to other WTO law.[4]
- **North-South clashes in values:** These are in a process of fundamental change. If PPM-based trade measures are to be allowed, the debate needs to shift to the relative inability of developing countries to meet tough environmental regulations, whether product or PPM-based. It must also focus on the legitimacy of the processes through which international standards are developed as many countries lack the resources to participate.
- **Extraterritorial measures:** This issue was dealt a mortal blow by the WTO Appellate Body, which ruled that measures to protect exhaustible resources outside a country's territory may, in some cases, enjoy exceptions to GATT rules.[5]

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- **Eco-dumping:** This was once a focus for Northern NGO efforts to reform the WTO. The charge was typically levelled at developing countries, which were said to subsidize exports through weak environmental regulation. But as a number of those NGOs gained deeper understanding of international development, the issue fell into disuse. There have been attempts to revive it in the context of Canada-U.S. softwood lumber trade, with US and Canadian NGOs arguing that Canada's provincial forest management practices subsidize domestic softwood producers.
- **Multilateral Environmental Agreements (MEAs):** The issue of how WTO law relates to the complex web that is environmental law—the numerous MEAs, regional and bilateral agreements, and the institutions that constitute the international environmental regime—is still a concern. And the Framework Convention on Climate Change, which aims at fundamental economic restructuring, may yet restore its former urgency. But the citing of MEAs in recent WTO Appellate Body rulings[6] and the signing of the Cartagena Protocol on Biosafety—an agreement that supplements WTO rules by clarifying how trade in genetically-modified organisms (GMOs) should be conducted[7]—suggest that the outline of a constructive approach to this relationship has begun to emerge.

The New Landscape

What are the new issues of urgency? There are a number of candidates, but three in particular deserve special attention:

Science and Precaution: National regulators have always made, and will always make, law in the absence of full scientific certainty. How can we ensure that they are free to protect the public while also ensuring that precautionary measures are not used as unfair forms of protection? Several ongoing or upcoming cases whose outcomes depend on the answers have reduced the prospects for thoughtful consideration of these issues in the WTO. There are cases that have been decided already, but where parties appear unwilling to accept the results, (e.g., the EU beef hormones case). And there are cases that have not yet been brought but that threaten to become even more controversial, especially concerning GMOs. Outside the WTO in the international standard-setting bodies, there is also great controversy over how to apply the precautionary principle, whether in creating standards, or in the processes of risk assessment and risk management that lead to those standards. Leaving the issue to be decided on a case-by-case basis through the WTO dispute settlement bodies is no solution. There is a broader systemic need to address science and precaution in trade.

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Standards: The Uruguay Round's TBT and SPS Agreements raise tough hurdles for countries whose standards are stricter than international ones. At the same time, international standards bodies are getting involved in public policy by developing standards to protect human, plant and animal life or health. As a result, previously-obscure international standards bodies, such as the *Codex Alimentarius* (food safety) and ISO (environmental management), are finding themselves in the spotlight. Not only do they struggle with the application of precaution, as described above, but they also face issues of transparency and legitimacy, complicated by the lack of a code of conduct for developing international standards. Can developing countries participate meaningfully in the formulation of standards that will affect their exports, given the costs of involvement in processes such as the *Codex* and ISO? And why should countries accept international public policy standards that their own standards bodies have not influenced? These issues could undermine the legitimacy of existing international standards to the detriment of the TBT and SPS Agreements.

Openness: Openness consists of two elements: first, the transparency of operations, with timely access to documents and the ability to monitor negotiations and deliberations; and second, the ability to use that access—mechanisms for input to the processes in question. Openness is not a new issue for the WTO, NGOs having demanded more of it for over a decade now, but the battles have changed. The WTO has done a commendable job of pursuing transparency, creating a comprehensive web site, running regular public briefings, and taking some steps toward more timely derestriction of documents. But on the second element of openness—participation—it has fallen short. At the heart of the controversy is the WTO's dispute settlement system, where non-governmental actors are demanding access to court documents, observer status during hearings, and the ability to submit arguments to the panels and Appellate Body (AB). The AB ignited a firestorm of protest from WTO Members when it invited applications for friends of the court submissions in a recent environment-related case, and then shocked the environmental community by denying all 13 requests without explanation.[8]

What are the implications of a shift in the focus of trade and environment conflicts? First, we should acknowledge that some of these new issues cut closer to the bone of environmental management than did the old. Foreign PPMs are a small subset of the types of concerns addressed by regulators, yet they dominated the debate in the early 1990s. The new concerns address all forms of standard setting. Any domestic measure for environmental protection is a potential barrier to trade, and the science on which it is based may be questioned. Further, the new technical requirements for regulation-making in the WTO Agreements oblige states to show not only that their measures are non-discriminatory, but also that they meet all the steps for law-making set out by these Agreements.[9] The WTO Agreements, unlike the GATT, set positive obligations on members not just for when they can act but for what steps they should take in acting. These new obligations create significant hurdles, and have huge resource implications for developing countries in particular as they seek to protect their environments.

Two "Old Landscape" Venues to Avoid

There are places in the old landscape that we should cease to visit. Two such venues are the battlegrounds for WTO-negotiated agreements on MEAs and PPMs.

MEAs: There are a number of proposals for dealing with the potential clash between MEAs and the WTO. From an environmental perspective, however, it may be better to leave things as they are. The clash, if it comes, will not be between an MEA and the WTO rules, but rather between some Party's implementing legislation and the WTO rules. In such a dispute, the WTO's mandate will be to determine if the legislation in question is legitimate environmental protection, or is in fact disguised protectionism, a task for which the dispute settlement body will likely end up using GATT's Article XX exceptions. While this situation would not be ideal, the recent use of Article XX by the AB has at least given some hope that it will be interpreted sensibly. The proposals for reform, on the other hand, will necessarily involve the WTO judging not just national-level measures, but also judging the MEA itself. Is the agreement, for example, sufficiently open and inclusive, constituting a true multilateral consensus on the environmental problem at hand? This scenario, coupled with the possibility that a negotiated agreement might actually give the disputed measures a rougher ride than they could expect under the status quo, argues for non-action on this issue.

PPMs: It was noted above that the PPMs issue seems to have been rendered moot by recent AB decisions. Some argue that there is still a need to negotiate an agreement among the members on the application of PPMs to codify the findings in those decisions. They point out that the membership of the AB rotates to eventually change completely; appointees serve one or two four-year terms. They warn that as its role in the WTO system becomes more clear, appointments to the AB are liable to be more closely watched and contested, or subject to attempts by some countries to appoint strategically. While AB rulings in effect constitute jurisprudence (despite language to the contrary in the Dispute Settlement Understanding), at some point some issue will test the degree to which the AB feels bound to follow that jurisprudence, with potentially damaging consequences. Underlying their arguments is the knowledge that most WTO members and Secretariat staff did not welcome the AB rulings on PPM-based measures.

But this same opposition is what makes negotiation a high-risk strategy. Any negotiated agreement will be the product of consensus by states that, for the most part, would be delighted to go back to the Tuna-Dolphin Panel's interpretations. Since the law on PPMs is "on the books," at least for the moment, the environmental community may have little to gain and much to lose from such negotiation.

The Fourth Ministerial and Beyond

What are the implications of the new agenda as we approach the WTO's Fourth Ministerial Conference? More generally, what does the new agenda mean for those whose objective it is to have international trade contribute to sustainable development?

It means a change in focus. The attention of the NGO community was for years centred on the WTO's Article XX, and its implications for unilateral PPM-based discrimination and for extraterritorial measures. But it has become increasingly obvious that the environment and, more broadly, sustainable development, are impacted by almost every facet of the WTO, from the Agreement on Trade-Related Intellectual Property to the General Agreement on Trade in Services.[10]

This is clearly illustrated in the Agreement on Agriculture, one of the key centres of conflict in the lead up to the Ministerial. From a sustainable development perspective, the Agreement is key; it offers the possibility that some measure of trade liberalization, or reduction in distortions, will finally come to a sector where many developing countries have a competitive advantage. From an environmental perspective, it is also crucial, in that it will guide how nations manage one of humankind's most intensive relationships with the natural environment. What will be the allowances for subsidies for environmental conservation purposes? Will we allow exceptions for trade rules in recognition of agriculture's multiple functions, including environmental protection and food security? How can we ensure that such exceptions do not simply replace the existing protectionist barriers? At what point do food safety standards become trade protectionism?

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For the trade community, and the WTO in particular, this means that the CTE is not enough. Even on its own terms it has been unsuccessful, unable to make any recommendations on how the trading system should change to accommodate environmental concerns. More fundamentally, while the discussions in the CTE have succeeded in deepening understanding on environmental issues in the WTO, there is a danger that this body may become too convenient an excuse for the WTO's failure to deal with those issues where they should be addressed: the various agreements themselves. There are two avenues—not necessarily mutually exclusive—for addressing this problem.

The first is to dissolve the CTE, with thanks for its important contributions, and to address environmental issues in each of the various agreements and bodies where they are important. To do this properly would require moves toward openness in both its facets: increased transparency of the processes, and increased ability of non-governmental organizations to contribute to policy-making.[11] In the run up to the third Ministerial, IISD recommended that the WTO establish a high-level advisory group to recommend areas in which the trading system needed to address sustainable development issues.[12] This recommendation still has merit.

The second is to negotiate a WTO Agreement on Trade-Related Environmental Measures (TREMs)—another of IISD's pre-Seattle recommendations. This would be an umbrella agreement covering the rules for environmental measures that have trade impacts. It should contain at least:

- an agreed understanding on the application of precaution in regulatory decisions. When and how should trade restricting national regulations be made in the absence of sufficient scientific understanding? It will be particularly important to have these agreements in place *before* the issue is again tested in the context of a dispute; and
- firm commitments to assist developing country exporters in meeting environmental and human health-based technical regulations. These might include such measures as helping establish national or regional centres for testing and certification, improving the flow of information to exporters regarding standards, etc.

Some would also like to see negotiated agreements on MEAs and PPMs under such an umbrella. It is argued above that this type of negotiation is risky, as desirable as it might be to have an environmentally sensible outcome. Indeed, the risk of these issues being included in any negotiations is used by some to argue against the idea of a WTO Agreement on TREMs.

Finally, the new importance of standards to international trade must broaden the focus of attention from the WTO to include the international standard-setting bodies, primarily the *Codex Alimentarius* and the ISO. The standards created by these bodies, and the processes through which they are agreed, have major implications for sustainable development. In particular, we need to recognize that developing countries may face difficulties in meeting new precaution-based standards. If our goal is sustainable development, rather than simply environmental protection, we should be pushing for ways to ensure meaningful developing country input in the standard-setting processes, and for technical assistance to developing countries in setting up the necessary testing and certification facilities on a national or regional basis. As a responsible first step, we should push everyone from independent eco-labellers to national and international standards bodies to voluntarily adhere to fair guidelines for standard setting and implementation, based on the TBT Agreement's Standards Code. The steps would benefit developed and developing exporters alike.

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Footnotes

1 The trade agenda has evolved to cover a myriad of issues including trade in services, intellectual property rights, investment, competition and others. This paper focuses only on trade in goods.

2 See Cosbey (2001).

3 See Howse (2000), Charnovitz (2000).

4 See WTO Appellate Body rulings on Shrimp-Turtle and, to a lesser extent, on Asbestos.

5 See WTO Appellate Body ruling on Shrimp-Turtle, and GATT Panel ruling on Tuna-Dolphin II.

6 See WTO Appellate Body ruling on Shrimp-Turtle.

7 See Cosbey & Burgiel (2000).

8 See *BRIDGES*, (2000).

9 The burden of proof on the various issues differs. The key point here is the need to comply with the new positive obligations on how to regulate as well the old negative obligations not to discriminate.

10 See von Moltke, 1996.

11 The consequent ability of private sector interests to use these same mechanisms is a price worth paying, particularly since in many respects it would represent simply making open and accountable the influence such bodies already have.

12 See IISD (1999).

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